IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

WP(C).No. 2642 of 2007(M)

OS.327/1997 of PRL.M.C., KOTTAYAM

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PETITIONER:

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1. K.M.SADASIVAN,
   TRIPURALAYAM, KOTTAYAM- 686001.

2. BINDU, W/O.SADASIVAN,
   TRIPURALAYAM, KOTTAYAM- 686001.

BY ADV. SRI,MATHEW PHILIP

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY
   THE SECRETARY TO GOVERNMENT, LAW DEPARTMENT,
   SECRETARIAT, THIRUVANANTHAPURAM.

2. K.V.SOMASEKHARAN,
   THEKKEKOICKAL HOUSE, CHUNKOM,
   KOTTAYAM- 686 001.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 23/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.2642 OF 2007

Dated 23rd January 2007

J U D G M E N T

Petitioners are defendants in O.S.327/97 on the file of Munsiff court, Kottayam. As against the decree petitioners filed A.S.99/2000. According to petitioners along with the appeal, application under Order XLI Rule 5 (2) of Code of Civil Procedure was filed for staying the execution of the decree and under Ext.P5 order execution of the decree was stayed. Subsequently, appeal was dismissed for default. It was restored later. Case of petitioners is that while restoring the appeal, I.A.1607/00, whereunder execution of the decree was originally stayed by Ext.P5, was not restored. Consequently, executing court is proceeding with execution petition. It is contended that even though petitioner filed applications for stay before the executing court and appellate court, no order of stay was granted. This petition is field under Article 227 of Constitution of India for a direction to the executing court to stay

further proceedings in the execution petition.

2. Learned counsel appearing for petitioners was heard.

3. Ext.P5 order dated 27/6/2000 in I.A.1607/00, shows that interim stay of execution of the decree was granted in A.S.99/00. A.S.99/00 was subsequently dismissed for default on 23/1/2006. According to petitioners, it was restored on 8/8/2006. Case of petitioners is that while restoring the appeal, I.A.1607/00 was not restored. From Ext.P5 it is not possible to say what happened to I.A.1607/00, subsequent to 27/6/2000 and whether the order of interim stay granted on 27.6.2000 continued till the appeal was dismissed for default on 23/1/2006. In such circumstance, it cannot be presumed that order of stay granted under Ext.P5 was prevailing when the appeal was dismissed for default on 23/1/2006.

4. Ordinarily, when a suit or appeal was dismissed for default and was restored subsequently, the pending applications shall automatically stand restored, unless court specifically otherwise provides. But if on the dismissal of appeal an order of stay was vacated and before restoration of the appeal decree was executed, it cannot be said that by restoration of

the appeal, order of stay would revive and would negative the execution proceedings. In such circumstance, on restoration of the appeal, it cannot be said that for stay of execution of decree application shall be automatically restored or the order of stay which has been prevailing at the time when appeal was dismissed for default is to be revived. According to learned counsel appearing for petitioners an application before the appellate court was filed for stay and it stands posted to 8/2/2007. In such circumstance, learned Sub Judge is directed to pass appropriate order in Ext.P9 application, as expeditiously as possible and at any rate on the next posting date. Executing court is directed to stay execution till 8/2/2007. While deciding the application for stay, the appellate court must bear in mind that unless compelling reasons are there, the application which was pending and dismissed, along with the appeal for default, shall be restored on restoration of the appeal.

Writ petition is disposed accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.